

# Council Tree Communications, L.L.C.

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April 9, 2002

William F. Caton  
Acting Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
TW-A325  
Washington, DC 20554

Re: Written and Oral Ex Parte Presentations-  
WT Docket No. 99-168  
GN Docket No. 01-74

Dear Mr. Caton:

Council Tree Communications, L.L.C. ("Council Tree") hereby gives notice of written and oral ex parte presentations in the referenced proceedings.

Council Tree's written presentations were made in the form of the enclosed letter, copies of which were delivered to Chairman Powell, Commissioners Abernathy, Copps, and Martin, and Thomas J. Sugrue of the Wireless Telecommunications Bureau. Council Tree also discussed the substance of this letter with Peter A. Tenhula in the Office of Chairman Powell.

One copy of Council Tree's written presentation is being submitted electronically herewith pursuant to Sections 1.1206(b)(1) and (b)(2) of the Commission's Rules.

Sincerely,



Steve C. Hillard

Enclosure

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April 9, 2002

## BY HAND DELIVERY

The Honorable Michael K. Powell  
Chairman  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Room 8-B201  
Washington, DC 20554

Re: Ex Parte Presentation\*  
FCC Auctions 31 and 44  
WT Docket No. 99-168  
GN Docket No. 01-74

Dear Chairman Powell:

I am writing to address the April 3, 2002 letter from Thomas E. Wheeler of the Cellular Telecommunications & Internet Association ("CTIA") to you urging the Commission to delay the start of the pending auctions for spectrum in the Upper and Lower 700 MHz bands (designated Auctions 31 and 44, respectively). Council Tree Communications, L.L.C. ("Council Tree") strongly opposes CTIA's request for a delay of Auctions 31 and 44, each of which should begin as scheduled on June 19, 2002.

In its letter, CTIA appears to argue that the Commission should delay the start of Auctions 31 and 44 for two reasons. First, CTIA suggests that the current state of Upper and Lower 700 MHz band clearing efforts are unclear, claiming that the "Commission is asking bidders to swing at a spectrum piñata, not knowing the contents." According to CTIA, this stated uncertainty prevents carriers from determining when the subject spectrum would be available for commercial service and keeps manufacturers from developing equipment for use in the bands at issue. Second, CTIA writes that a prompt auction of spectrum in the Upper and Lower 700 MHz bands, though consistent with the plain statutory mandate to complete the auction of the Lower band by September, would be difficult to administer due to the pendency of a separate proceeding on advanced wireless services. While CTIA acknowledges its own prior claims of "spectrum starvation," it nevertheless argues that the Commission should put aside the Upper and Lower 700 MHz band auctions until some unspecified time in the future. On each of these points, however, CTIA is wrong.

First, CTIA is wrong to suggest that the current state of Upper and Lower 700 MHz band clearing efforts is unclear. The Commission set forth 700 MHz band clearing procedures in at least four separate orders that have been issued since 2000, and the Wireless Telecommunications Bureau has established an expedited schedule to resolve outstanding petitions for reconsideration of the Lower 700 MHz band rules. Moreover, prospective bidders may evaluate the level of broadcast incumbency in the various markets and spectrum blocks for which licenses are to be offered in Auctions 31 and 44, factoring those levels into their bid amounts and strategies. Though broadcast incumbency in the 700 MHz bands indeed presents a planning challenge for potential bidders such as Council Tree, that challenge is not at all insurmountable as CTIA suggests.

Tellingly, this is not the first time that CTIA has urged the Commission to delay the auction of spectrum in the 700 MHz band on this basis. In July, 2000, CTIA wrote to then-Chairman Kennard urging the Commission to delay the start of Auction 31, which at that time was scheduled to begin on September 6, 2000. Among other things, CTIA argued that potential bidders needed additional time to implement the negotiation process to clear incumbent broadcasters from the Upper 700 MHz band, explaining that "[n]ow that these issues have been clarified, the Commission should allow a sufficient period of time for negotiations to take place." Indeed, according to CTIA, "[r]egardless of their outcome, providing additional time for negotiations will lend greater certainty to the auction, which will aid bidders in formulating their business models and bidding strategies." Nearly two years later, however, CTIA still urges delay for these reasons, suggesting that there is no realistic scope to CTIA's "additional time" request.

On the substance of the matter, the continuing presence of incumbent broadcast licensees in the Lower and Upper 700 MHz bands should actually *encourage* the Commission to proceed to auction the Upper and Lower 700 MHz band licenses on schedule, particularly for the benefit of smaller bidders. Frequent delays in conducting the Upper 700 MHz band auction and the current stalemate regarding broadband PCS licenses creates the impression that the Commission's competitive bidding processes cannot be relied upon. In turn, that impression makes it more difficult for all potential bidders to make firm plans to participate in an announced auction in general, and it limits the number of entities that are willing to provide financing to potential smaller bidders such as Council Tree in particular. Delay in auctioning the Upper and Lower 700 MHz band licenses at this point, therefore, will frustrate the ability of smaller entities actually to participate in the auctions in the long run.

It is also important to note that, for prospective smaller bidders, Auction 44 presents material opportunities that are less affected by the band clearing process. The Lower 700 MHz band Block C (710-716 MHz/740-746 MHz) is to be licensed in Metropolitan Statistical Areas and Rural Service Areas across the nation, and the auction for this spectrum is to feature a bidding credit of up to 35 percent for smaller

businesses. These smaller service areas and increased bidding credits make the Lower 700 MHz band Block C attractive to smaller bidders with viable business plans. Moreover, the Lower 700 MHz band Block C is comprised of the spectrum associated with current television stations 54 and 59, and it is adjacent in part to the Lower 700 MHz band Block D (716-722 MHz/unpaired), which is comprised of the spectrum associated with current television station 55. Under the Commission's governing broadcast interference rules, Channels 54 and 55 will never have incumbent broadcasters in the same market. A bidder for the Lower 700 MHz band Block C, therefore, may also bid for the Lower 700 MHz band Block D in markets with incumbent broadcasters as a means to achieve "clear" contiguous spectrum quickly. The Commission should not delay this important opportunity.

Finally, prompt auction of Upper and Lower 700 MHz band licenses will *promote* technology and equipment development for this spectrum. So long as the availability of redeployed 700 MHz spectrum remains a fiction, there will be little incentive for vendors seriously to develop equipment for this spectrum, thus aggravating 700 MHz spectrum valuation issues. The licenses in the Upper and Lower 700 MHz bands represent a substantial amount of spectrum that will permit the provision of much-needed new wireless and broadcast-like services. For this promise to be fulfilled, however, potential licensees and equipment manufacturers must prepare for the innovative deployment of this spectrum, which preparation cannot reasonably be done while the licenses are being withheld by the Commission. Auctioning rights to this critical spectrum will permit manufacturers to complete the development of necessary equipment with an actual market in which to test and sell their products. The long term results of on-time auctions, therefore, will be greater and more efficient use of the entire Upper and Lower 700 MHz band allocation.

Second, CTIA argues that "if the 700 MHz auctions are held in June as scheduled, they will be completed before the FCC's advanced wireless services rulemaking is finished, and before the auction for spectrum for advanced wireless services is completed." Yet, CTIA goes on to acknowledge that "[s]ignificant work still remains to secure that spectrum, part of which is currently held by the Department of Defense." To be certain, this cannot reasonably serve as the basis for delaying the long-scheduled Upper 700 MHz band auction and the more-recently scheduled Lower 700 MHz band auction. Indeed, while CTIA estimates that "[s]ignificant work" remains to be done in an advanced wireless services rulemaking, the Commission is faced with a statutory directive to complete the auction of Lower 700 MHz band licenses by September. Potential Auction 31 and 44 bidders have organized business plans and secured financing in reliance on the current auction schedule, and the Commission should not upset those arrangements due to the continuing pendency of a separate proceeding that still requires "[s]ignificant work."

Moreover, though CTIA suggests that the plain statutory directive to complete the auction of Lower 700 MHz band licenses by September can easily be interpreted away, that is not so. The Commission does not have the latitude under the Balanced Budget Act of 1997 and Section 309(j) of the Communications Act to "opt out" of the congressional directive to deposit auction revenues in the Treasury by September 30, 2002, and any such Commission choice would surely prompt legal challenges from interested parties. The resulting litigation and uncertainty would be specifically detrimental to the public interest in the efficient redeployment of 700 MHz band spectrum, and it would operate to the disadvantage of smaller entities that are preparing for Auctions 31 and 44. Avoiding legal and regulatory uncertainty is particularly important in the context of creating opportunities for smaller bidders. The Commission has frequently undertaken to preserve settled expectations and business relationships as a way to encourage investment in designated entity auction applicants, and adherence to Congress's plainly-stated auction directive in this context will promote that effort. Conversely, ignoring that plain statutory mandate would only serve to discourage current and future investment in prospective smaller bidders. That would not be in the public interest.

At bottom, the Commission will always be faced with the arguments of those who wish to reorganize the Commission's spectrum auction schedule for their own purposes, and the Commission must seriously evaluate the merits of their claims. In this case, the merits are suspect. In July, 2000, CTIA urged the Commission to postpone the start of Auction 31 until June, 2001, arguing that:

[p]roviding regulatory certainty will benefit the public and the Commission's auction and spectrum policies by allowing all interested parties to have as much information as possible in preparing for the auction.

Though Auctions 31 and 44 are now scheduled to start in June, 2002, CTIA still urges delay, arguing once again that:

[a] delay of these auctions to provide regulatory certainty would benefit the public and the Commission's spectrum management policies by allowing all interested parties to have as much information as possible in preparing for the auctions.

Having advanced the very same argument two years ago in support of delaying one of the two auctions at issue here, CTIA's latest claim rings hollow. Indeed, though perfect marketplace information would be a virtue in any competitive bidding process, the Commission cannot indefinitely postpone every scheduled auction event until CTIA's articulated "perfection" is attained. There could be no reliable spectrum auction schedule if that were the practice.

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Instead, the Commission must announce and adhere to a consistent auction schedule to permit prospective bidders to secure and preserve financing commitments and to complete business plans for the provision of service. Here, Congress has directed the Commission to complete the auction of Lower 700 MHz band licenses by September, and the auction of Upper 700 MHz band licenses has already been postponed far too long. Continuing to postpone the redeployment of the 700 MHz bands would be inconsistent with the plainly expressed intent of Congress and with the clear public interest in the provision of new services using this critical spectrum.

For these reasons, Council Tree urges the Commission to begin Auctions 31 and 44 as scheduled on June 19, 2002.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steve Hillard", written in a cursive style.

Steve C. Hillard  
President

cc: The Honorable Kathleen Q. Abernathy  
The Honorable Michael J. Copps  
The Honorable Kevin J. Martin

Thomas J. Sugrue, Esq.  
William F. Caton

Thomas E. Wheeler

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\* One copy of this letter will be submitted electronically to the Commission pursuant to the requirements of Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.1206(b).